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In the Supreme Court of the United States

KEVIN TRUDEAU, PETITIONER

v.

UNITED STATES, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding—in conflict with principles of statutory interpretation articulated by this Court and with decisions of the D.C. Circuit—that a judge-made "sovereign-capacity" exception limits the scope of the Tucker Act, which confers on the Court of Federal Claims "jurisdiction to render judgment upon *any* claim against the United States founded * * * upon *any* express or implied contract with the United States," 28 U.S.C. § 1491(a)(1) (emphasis added).

PARTIES TO THE PROCEEDINGS

Petitioner Kevin Trudeau was the plaintiff-appellant in the court below. The United States was the defendant-appellee in the court below. There are no other parties.

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INTRODUCTION

Rather than simply apply the plain language of the Tucker Act—which confers jurisdiction on the Court of Federal Claims over "any" claim arising from "any" contract with the United States—the courts below dismissed petitioner's complaint for breach of a settlement agreement on the ground that the United Stated entered into the agreement in its sovereign, rather than proprietary, capacity. That holding contravenes principles of statutory construction repeatedly articulated by this Court, and conflicts with decisions of this Court holding that the term "any" is to be given its plain, ordinary, and unrestricted meaning, absent a clear indication to the contrary. *E.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Brogan* v. *United States*, 522 U.S. 398 (1998); *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125 (2002). Congress gave no indication that it wished to limit the jurisdiction of the Court of Federal Claims in this manner, and the courts below improperly imputed to Congress an intention that is nowhere expressed in the statute itself.

The decisions below also conflict with decisions of the D.C. Circuit recognizing that the Tucker Act means just what it says. In at least two recent cases, the D.C. Circuit held that private plaintiffs are *required* to bring claims against federal agencies for breach of litigation settlement agreements in the Court of Federal Claims rather than in district court. *Shaffer* v. *Veneman*, 325 F.3d 370 (D.C. Cir. 2003); *Brown* v. *United States*, 389 F.3d 1296 (D.C. Cir. 2004) (*per curiam*). Consistent with the plain language of the Tucker Act, the D.C. Circuit does not recognize the "sovereign capacity" exception applied by the Court of Federal Claims and the Federal Circuit.

Moreover, the question presented has significant implications beyond this case. That question can arise any time the United States enters into a litigation-related agreement with a private party, whether the United States is plaintiff or defendant, and even where the purpose of the agreement is to avoid litigation altogether.

This Court should clarify the scope of the Court of Federal Claims' subject-matter jurisdiction under the Tucker Act so that private parties who negotiate agreements with the United States will know whether they can rely upon the means of redress that Congress provided in the statute.

OPINIONS BELOW

The decision of the United States Court of Federal Claims (Miller, J.) is reprinted at Pet. App. 1a-22a and is reported at 68 Fed. Cl. 121. The Federal Circuit's judgment affirming the decision of the Court of Federal Claims is reprinted at Pet. App. 23a and is not otherwise published. The Federal Circuit's order denying rehearing is reprinted at Pet. App. 24a and is not otherwise published.

JURISDICTION

The Federal Circuit entered its judgment on June 13, 2006 and denied rehearing and rehearing *en banc* on September 8, 2006. The Chief Justice extended the time to file this petition to and including January 22, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Tucker Act provides, in relevant part, that "[t]he Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

STATEMENT

Petitioner Kevin Trudeau is a best-selling author and producer of television and radio infomercials promoting natural remedies for various health problems. In his publications and infomercials, petitioner has criticized federal agencies, including the Federal Trade Commission ("FTC"), for stifling discussion and marketing of natural

foods and health alternatives. This case involves the FTC's ongoing effort to discredit petitioner's marketing practices.

1. The FTC sued petitioner and others in the United States District Court for the Northern District of Illinois. The lawsuit alleged that petitioner had violated sections 5(a) and 12 of the Federal Trade Commission Act by engaging in false advertising in connection with his marketing of two products—Coral Calcium Supreme and Biotape. The district court subsequently entered a stipulated preliminary injunction forbidding petitioner to make allegedly misleading representations about Coral Calcium Supreme and Biotape, and later held petitioner in contempt of this injunction. After more than a year of litigation, the FTC agreed to settle all its claims against petitioner, including any additional remedies in connection with the court's contempt finding. That agreement was memorialized in a "Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief" (the "Stipulated Order").

For his part, petitioner agreed that he would not make misleading representations about the health benefits of his products or the conclusions of scientific tests or studies, among other things. He also agreed to pay the FTC $2 million and to notify the FTC of any changes of his name, residence, mailing address, telephone number, or employment status for a period of five years.

In exchange for these concessions, the FTC agreed to resolve all its claims against petitioner *without any admissions or findings of wrongdoing on his part.* Paragraph 8 of the Stipulated Order makes clear that petitioner was not found liable for false advertising:

> Defendants * * * expressly deny any wrongdoing or liability for any of the matters alleged in the Complaint and the civil contempt action. There have been no findings or admissions of wrongdoing or liability by the

> Defendants * * * other than the finding against Kevin Trudeau for contempt of [the earlier injunction].

In addition, Section XIII.D of the Stipulated Order provides that "[n]o portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty or punitive assessment."

2. Five days after the district court entered the Stipulated Order, the FTC issued a press release entitled "Kevin Trudeau Banned from Infomercials: Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape." The press release described the restrictions on petitioner's future marketing activities—which were hardly a "ban"—as well as the $2 million judgment. The press release then quoted Lydia Parnes, Acting Director of the FTC's Bureau of Consumer Affairs, who stated that the Stipulated Order was "meant to shut down an infomercial empire that has misled American consumers for years * * * * Other habitual false advertisers should take a lesson; mend your ways or face serious consequences."

Apparently recognizing that the text of the press release was itself misleading—for example, by suggesting that petitioner had been found guilty of false advertising—the FTC dropped a "note" at the end of the document stating that "[t]his stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation."[1]

The FTC's press release has been widely reported and is featured prominently on the FTC's website. Petitioner

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[1] At least when it is regulating others, the FTC does not consider such marginal disclaimers sufficient to avoid liability for false advertising. See Federal Trade Comm'n, *Dot Com Disclosures—Information About Online Marketing* 8 (2000), *available at* http://www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html ("If a disclosure provides information that contradicts a claim, the disclosure will not be sufficient to prevent the ad from being deceptive").

asked the FTC to edit the press release or remove it from the agency's website, but the FTC refused. Thus, the press release remains on the website to this day, with a link to the FTC's complaint against petitioner, at http://www.ftc.gov/opa/2004/09/trudeaucoral.htm (visited Jan. 19, 2007). Other websites repeated the assertions made in the FTC's press release.[2] A recent Google search of the terms "Kevin Trudeau" and "false" and "advertise"—key terms in the FTC's press release—generated more than 800 links. And more than 100 of those links include the word "habitual," which first appeared in the FTC's description of petitioner as a "habitual false advertiser."

The FTC's misleading characterizations of petitioner and the settlement agreement made their way into traditional media as well as Internet outlets. CNN, the *New York Times*, the *Los Angeles Times*, the *Washington Post*, and WTOP Radio all reported on the settlement, frequently lifting language from the FTC's press release, including the "habitual false advertiser" language.

3. Concerned about the inconsistency between the Stipulated Order and the FTC's public statements about the case—and what he viewed as the falsehoods in those statements—petitioner filed a complaint in the Court of Federal Claims. The complaint alleged that the FTC had breached the covenant of good faith and fair dealing in its settlement agreement with petitioner.[3] Specifically, peti-

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[2] See, *e.g.*, "Trudeau Banned From Infomercials," (Sept. 10, 2004), *available at* www.consumeraffairs.com/news04/ trudeau_informercials.html; "Is Infomercial King a Helper or Huckster?," (Jan. 13, 2006), *available at* http://www.abcnews. go.com/ Nightline/story? id=1503856.

[3] Every contract includes an implied covenant of good faith and fair dealing. See *First Nationwide Bank* v. *United States*, 431 F.3d 1342, 1349 (Fed. Cir. 2005); *Restatement (Second) of Contracts* § 205 (2006); 13 *Williston on Contracts* § 38:15 (4th ed. 2006). Petitioner's complaint alleges that the FTC breached that implied covenant by issuing a press release that eviscerated important contractual consideration bargained for by petitioner,

tioner alleged that the FTC press release falsely described him as a "habitual false advertiser" and falsely suggested that the Stipulated Order had found him liable for false advertising. According to the complaint, the press release thus "effectively deprived [petitioner] of the bargained-for benefits of the Agreement; it constituted a material breach of the Agreement; and it has caused [petitioner] substantial financial injury."

The Court of Federal Claims dismissed petitioner's complaint for lack of subject-matter jurisdiction. Pet. App. 2a. The court acknowledged that the Tucker Act confers jurisdiction on the Court of Federal Claims to decide "any claim against the United States founded * * * upon any express or implied contract with the United States." Pet. App. 12a (citing 28 U.S.C. § 1491). Nevertheless, the court dismissed petitioner's complaint on the ground that prior decisions of the Court of Federal Claims and the Federal Circuit carve out an *exception* to Tucker Act jurisdiction for claims arising from contracts entered into by the United States in its sovereign, as opposed to its proprietary, capacity. Pet. App. 21a-22a.

Following *Kania* v. *United States*, 650 F.2d 264 (Ct. Cl. 1981), the Court of Federal Claims asserted that "[t]he jurisdiction of the Court of Federal Claims does not extend to contracts entered into by the Government in its sovereign capacity that do not unmistakably subject the United States to damages in the event of breach."[4] Pet. App. 12a.

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namely, the FTC's agreement that "[t]here have been no findings or admissions of wrongdoing or liability" by petitioner.

[4] *Kania* involved a claim by a former officer of the Railway Express Agency, which had been the subject of an Interstate Commerce Commission investigation. The ICC referred the investigation to the United States Attorney's office, which later sought Kania's assistance. According to Kania, the Assistant United States Attorney offered, and he accepted, "transactional immunity"—the United States agreed not to prosecute Kania for his conduct at Railway Express in exchange for truthful grand jury

The court rejected petitioner's argument that the "sovereign capacity" exception described in *Kania* is limited to the criminal context, observing that the Court of Federal Claims has applied the exception for decades without discussing any distinction between civil and criminal cases. Pet. App. 13a-15a. The court also rejected petitioner's argument that *Kania* and its progeny were wrongly decided. Pet. App. 16a n.4.

Having concluded that the "sovereign capacity" exception could apply in this civil case, the Court of Federal Claims next determined that the FTC was acting in its sovereign, rather than its proprietary, capacity when it entered into the settlement agreement with petitioner. Pet. App. 18a-20a. According to the court, "[t]he FTC's

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testimony about the company. Kania testified before the grand jury and several months later learned that he was the target of a grand jury investigation himself. See 650 F.2d at 265-266.

Kania was indicted, but a federal district court dismissed the indictment on the ground that Kania had satisfied his obligations under the immunity agreement and thus could not be prosecuted. Kania then brought a Tucker Act claim in the Court of Claims, alleging that the United States breached its contractual agreement not to prosecute him. Although Kania had succeeded in obtaining a dismissal of the indictment, he claimed that he was entitled to damages for the expenses he incurred in preparing his defense. See *id.* at 266-267.

The Court of Claims dismissed Kania's complaint for lack of jurisdiction, asserting that notwithstanding the broad jurisdictional grant expressed in the statute, "[t]he contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of the minds." *Id.* at 268. To the contrary, Congress intended to waive federal sovereign immunity principally "where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services[—]transactions such as private parties, individuals or corporations also engage in among themselves." *Ibid.*

purpose when it initiated, litigated, and later settled, the enforcement action was clear: to protect the public against deception by ensuring, through the remedies afforded by the FTC Act, that advertising conveys truthful information to the public." Pet. App. 19a. The court concluded that, because the FTC "did not receive goods or services in exchange for its agreement to entry of the Stipulated Order," it acted "in its sovereign, not proprietary, capacity" when it agreed to the settlement. Pet. App. 20a.

The court next reviewed the Stipulated Order to determine whether it evidenced an "unmistakable promise to subject the United States to monetary liability." Pet. App. 20a (quotations omitted). Because the Stipulated Order "contains no provision for the payment of money damages in the event of a breach by the Government," the court concluded that the "sovereign capacity" exception to Tucker Act jurisdiction applies. Pet. App. 21a. Accordingly, the Court of Federal Claims dismissed petitioner's breach-of-contract complaint for lack of subject-matter jurisdiction. Pet. App. 21a-22a.

The Federal Circuit affirmed the dismissal of petitioner's complaint without opinion. Pet. App. 23a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for three reasons. *First*, the decisions below conflict with this Court's decisions holding that jurisdictional statutes must be applied according to their plain terms. See Sup. Ct. R. 10(c). *Second*, the decisions below conflict with recent decisions of the D.C. Circuit holding that private plaintiffs in cases such as this one must take their breach-of-settlement claims to the Court of Federal Claims, not district court. See Sup. Ct. R. 10(a). *Third*, the question presented is of considerable practical importance in many other cases. See Sup. Ct. R. 10(c).

I. The Decisions Below Rest On A "Sovereign Capacity" Exception That Contravenes The Plain Language Of The Tucker Act And Conflicts With This Court's Settled Rules Of Statutory Interpretation.

For 25 years, the Court of Federal Claims has applied a "sovereign capacity" exception to the Tucker Act, dismissing breach-of-contract claims against the United States where the court determines that the United States made the contract in its sovereign, rather than its proprietary, capacity. See, *e.g.*, *Awad* v. *United States*, 61 Fed. Cl. 281 (2004); *Houston* v. *United States*, 60 Fed. Cl. 507 (2004); *Doe* v. *United States*, 37 Fed. Cl. 74 (1996); *Drakes* v. *United States*, 28 Fed. Cl. 190 (1993); *Grundy* v. *United States*, 2 Cl. Ct. 596 (1983); *Bloemker* v. *United States*, 229 Ct. Cl. 690 (1981); *Kania*, 650 F.2d 264.[5]

This sovereign/proprietary distinction does not appear in the Tucker Act, which confers jurisdiction over "any" claim arising from "any" contract with the United States. The Court of Federal Claims departed from the text of the statute when it created the "sovereign capacity" exception, relying instead upon its assessment of what "Congress undoubtedly had in mind." *Kania*, 650 F.2d at 268. The result is that the Court of Federal Claims, with the acqui-

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[5] Citations to "Ct. Cl.," "Cl. Ct.," and "Fed. Cl." all refer to the court that is now known as the Court of Federal Claims. The original Court of Claims, established in 1855, exercised both original and appellate jurisdiction. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), assigned the original jurisdiction of the Court of Claims to the United States Claims Court and its appellate jurisdiction to the United States Court of Appeals for the Federal Circuit. Pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992), the Claims Court was renamed the United States Court of Federal Claims. The Federal Circuit has adopted the decisions of its predecessors—including the Court of Claims—as its own precedents. *South Corp.* v. *United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

escence of the Federal Circuit, has redefined its own subject-matter jurisdiction by fiat, limiting the scope of the jurisdictional statute enacted by Congress.

In reaching this result, the decisions below conflict with this Court's holdings that "any" means "any" unless the relevant statute qualifies or limits that term. Those decisions also conflict with this Court's fundamental teaching that courts construing jurisdictional statutes must not disregard or evade the boundaries drawn in the statutory text. Under our Constitution, it is for Congress to determine the kinds of cases that lower federal courts—including the Court of Federal Claims—may decide.

A. The decisions below conflict with this Court's decisions holding that "any" means "*any*."

The decisions below limit the subject-matter jurisdiction of the Court of Federal Claims based upon a conclusion that the United States never consented to be sued for breach of a contract made in its sovereign capacity. This conclusion cannot be reconciled with the plain language of the Tucker Act, which confers jurisdiction on the Court of Federal Claims to decide "any" claim founded upon "any" contract.

1. It is common ground that "the United States, as sovereign, is immune from suit save as it consents to be sued * * * and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc.* v. *United States*, 516 U.S. 417, 422 (1996) (quotations omitted). This Court has held that the Tucker Act, 28 U.S.C. § 1491, represents a broad waiver of federal sovereign immunity. *United States* v. *Mitchell*, 463 U.S. 206, 215-219 (1983); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 466 (1980) (*per curiam*); cf. *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 734 (1982). Thus, "[i]f a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Mitchell*, 463 U.S. at 216.

The Tucker Act, in turn, provides that "[t]he Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, *or upon any express or implied contract with the United States*, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (emphasis added). Based on the historic jurisdiction of the original Court of Claims and the absence of any provision in the Tucker Act to the contrary, this Court has held that the Act applies only to claims for monetary relief. *United States* v. *King*, 395 U.S. 1, 2-3 (1969). Thus, if a private plaintiff sues the United States for breach of some constitutional, statutory, regulatory, or contractual obligation, and seeks monetary relief for that breach, the Tucker Act waives federal sovereign immunity and authorizes the Court of Federal Claims to hear the case.

As this Court observed in *Mitchell*, this waiver of sovereign immunity is "readily apparent" with respect to claims for breach of contract. 463 U.S. at 215. "The Court of Claims' jurisdiction over contract claims against the Government has long been recognized, and Government liability in contract is viewed as perhaps '*the widest and most unequivocal* waiver of federal immunity from suit.'" *Ibid.* (emphasis added). The Tucker Act "unmistakably" provides the consent to suit for contract claims. *Ibid.*

The scope of the Court of Federal Claims' jurisdiction to hear contract claims depends upon the scope of the jurisdictional grant in the Tucker Act with respect to such claims. Here, Congress expressed its wishes in the broadest terms: The Court of Federal Claims has jurisdiction over "any" claim arising from "any" contract with the United States. 28 U.S.C. § 1491(a)(1).

2. In this context, "any" necessarily means "any." As this Court has explained, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." *United States* v. *Gonzales*,

520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). And this Court has rejected various attempts to restrict the scope of statutes that employ the broad term "any."

For example, the Court in *Brogan* v. *United States*, 522 U.S. 398 (1998), held that 18 U.S.C. § 1001—which criminalizes making "any false, fictitious or fraudulent statements" to a federal agency—does not admit an exception for the simple denial of guilt (the "exculpatory no"), as some courts had held. The petitioner there argued that the statute should not apply to the "exculpatory no" because that kind of statement does not "pervert governmental functions," the evil against which the statute was directed. *Id.* at 401-402. This Court rejected that argument on the ground that the literal text of the statute did not suggest a limitation on the kinds of false statements that were forbidden. *Id.* at 402-403. "[I]t is not, and cannot be our practice," the Court explained, "to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify the evil from something other than the text of the statute itself." *Id.* at 403.

Similarly, the Court in *Department of Housing & Urban Development* v. *Rucker*, 535 U.S. 125 (2002), rejected a proposed limitation on a statute requiring public housing agencies to use leases providing that termination could result from "any drug-related criminal activity" by members of a tenant's household on or off the leased premises. The Ninth Circuit had held that this statute did not permit termination of a lease where the tenant did not know of and had no reason to know of the drug-related criminal activity. *Id.* at 129-130. This Court rejected that interpretation of the statute, explaining that "Congress' decision not to impose any qualification in the statute, combined with its use of the term 'any' to modify 'drug-related criminal activity,' precludes any knowledge requirement." *Id.* at 130-131.

As *Brogan* and *Rucker* demonstrate, "any" means "any" unless Congress expressly limits the scope of that term. And although this Court has noted that context can be important in interpreting the term "any," see *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994), the context here provides no support for a "sovereign capacity" exception to Tucker Act jurisdiction.

Indeed, the statute nowhere limits the kinds of contract claims that can be decided by the Court of Federal Claims. See *Lewis* v. *United States*, 445 U.S. 55, 60 (1980) ("No modifier is present, and nothing suggests any restriction on the scope" of the relevant term). Far from limiting the range of contract claims that support Tucker Act jurisdiction, the statute applies broadly to claims based on *express or implied* contracts and claims for *liquidated or unliquidated* damages.

It is no answer to say that statutory waivers of immunity must be strictly construed, for the Tucker Act "waives the Government's immunity from suit in *sweeping language*." *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951) (emphasis added) (interpreting the statutory exceptions to waiver in the Federal Tort Claims Act). Even where the relevant statute contains exceptions to the waiver of immunity, this Court has been careful not to give "unduly generous interpretations of the exceptions" that would "defeat[ ] the central purpose of the statute." *Kosak* v. *United States*, 465 U.S. 848, 854 n.9 (1984). As this Court explained just last Term, the principle favoring strict interpretation of waiver statutes is "unhelpful" where the "sweeping language" of the statute makes clear Congress' intent to consent to suit. *Dolan* v. *United States Postal Serv.*, 126 S. Ct. 1252, 1260 (2006) (declining to enlarge one of the FTCA's exceptions to waiver). That principle is even more "unhelpful" with respect to the Tucker Act, which confers jurisdiction over "any" claim arising from "any" contract, without exception.

Taken as a whole, the plain language of the Tucker Act evinces congressional intent to make the Court of Federal

Claims available for claims against the United States for breach of "*any*" contract—"indiscriminately of whatever kind." *Gonzales*, 520 U.S. at 5. And the lower courts' holding that petitioner's suit is nevertheless barred by a judge-made "sovereign capacity" exception conflicts with this Court's decisions on the meaning of the word "any."[6]

B. The decisions below conflict with this Court's holdings that jurisdictional statutes must be applied according to their plain terms.

The decisions below conflict not only with *Brogan* and *Rucker*, but also with this Court's teaching that jurisdictional statutes must be applied according to the terms that Congress prescribed. The decisions below do not even purport to apply the literal terms of the Tucker Act, contrary to the basic proposition that courts should look to the plain text of a statute to determine its meaning. This error is compounded by the fact that the Tucker Act is a *jurisdictional* statute. Congress alone holds the power to determine the kinds of cases that lower federal courts should decide, see U.S. Const. art. III, and those courts cannot restrict their own jurisdiction by creating nontextual exceptions to jurisdictional statutes.

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[6] There can be no doubt that the Stipulated Order is a "contract" for purposes of Tucker Act jurisdiction. See *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975) ("a consent decree or order is to be construed for enforcement purposes basically as a contract); *Hansson* v. *Norton*, 411 F.3d 231, 232 (D.C. Cir. 2005) ("[t]his court generally treats settlement agreements as contracts subject to the exclusive jurisdiction of the Court of Federal Claims"); *Massie* v. *United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999) (holding that a settlement agreement resolving the plaintiff's medical-malpractice claim against the Department of the Navy satisfied the Tucker Act). Indeed, the Court of Federal Claims did not doubt that the Stipulated Order is a "contract"; rather, it concluded that the Stipulated Order is not the *right kind of contract* to support Tucker Act jurisdiction.

1. The plain language of the Tucker Act was cast aside when *Kania* first asserted, without citing any authority, that "[t]he contract liability which is enforceable under the Tucker Act consent to suit does not extend to every agreement, understanding, or compact which can semantically be stated in terms of offer and acceptance or meeting of minds." 650 F.2d at 268. According to the court in *Kania*, jurisdiction under the Tucker Act is appropriate only "where the sovereign steps off the throne and engages in purchase and sale of goods, lands, and services, transactions such as private parties, individuals or corporations also engage in among themselves." *Ibid.*

Kania does not purport to apply the plain meaning of the statute but rests on the court's assessment of what "Congress undoubtedly had in mind as the principal class of contract case in which it consented to be sued." *Ibid.* Yet the court cited no authority for its conclusion that Congress "undoubtedly had in mind" a waiver of sovereign immunity more limited than the waiver it wrote into the statute. Instead, the court in *Kania* simply imposed a gloss on the plain language of the statute based on unsupported speculation about congressional intent.

2. This analysis cannot withstand scrutiny under this Court's rules of statutory interpretation. "The starting point in discerning congressional intent is the existing statutory text." *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004). Indeed, there is a "strong presumption" that "the plain language of the statute expresses congressional intent," and this presumption is rebutted "only in rare and exceptional circumstances * * * when a contrary legislative intent is clearly expressed." *Ardestani* v. *INS*, 502 U.S. 129, 135-136 (1991) (quotations and citations omitted); see *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997) ("The legislative intent of Congress is to be derived from the language and structure of the statute itself * * * *"). Thus, "when the statute's language is plain, the sole function of the courts—at least where the disposi-

tion required by the text is not absurd—is to enforce it according to its terms." *Lamie*, 540 U.S. at 534.

As we have shown, the plain language of the Tucker Act confers jurisdiction over "any" breach-of-contract claim, whether or not the United States made the contract in its sovereign capacity. The "sole function" of the court in *Kania*—and the court in this case—was to enforce the Act according to its terms and decide the breach-of-contract claim on its merits.

3. *Kania*'s abandonment of the plain text of the statute is all the more troublesome because the statute at issue defines the court's own jurisdiction. It is a "settled proposition" in this Court's decisions that "the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845)). "Congress has the constitutional authority to define the jurisdiction of the lower federal courts, and once the lines are drawn, limits upon federal jurisdiction * * * must be neither disregarded nor evaded." *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) (quotations and citation omitted).

Keene itself demonstrates this Court's commitment to the statutory text in determining the Court of Federal Claims' subject-matter jurisdiction. The plaintiff there filed two complaints against the United States in the Court of Federal Claims, seeking to recoup money it had paid to defend and settle certain asbestos claims. *Id.* at 202. "When it filed each complaint, however, Keene had a similar claim pending against the Government in another court." *Ibid.* This was fatal to Keene's claims, because Congress had provided that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. The plaintiff argued that this restriction

on the court's jurisdiction resulted in an undue hardship, but this Court rejected that contention, explaining that "the proper theater for such arguments, * * * is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims. We enjoy no liberty to add an exception * * * to remove an apparent hardship, and therefore enforce the statute." 508 U.S. at 217-218 (quotations and citations omitted).

Just as this Court "enjoy[ed] no liberty to add an exception" to the statute *limiting* the Court of Federal Claims' jurisdiction, the court below was not permitted to create a "sovereign capacity" exception to the statute *conferring* jurisdiction. Indeed, 28 U.S.C. § 1500 shows that Congress knows how to limit the jurisdiction of the Court of Federal Claims when it wishes to do so. As *Keene* makes clear, Congress alone is empowered to determine the subject-matter jurisdiction of the Court of Federal Claims. That court has no authority to close its doors to claims that Congress has assigned to it.

In sum, the Court of Federal Claims was not permitted to "restrict the unqualified language of [the] statute" defining its subject-matter jurisdiction. *Brogan*, 522 U.S. at 403. "[A]s a jurisdictional statute," the Tucker Act "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (quotations omitted). The "sovereign capacity" exception is neither precise nor faithful to the plain terms of the Tucker Act, and it should be retired.[7] Accordingly, this Court should grant the petition

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[7] As we have shown, the Court of Federal Claims and the Federal Circuit broke new ground when they manufactured the "sovereign capacity" exception. In this case, they have expanded that exception to reach contracts made in connection with *civil* cases. The "sovereign capacity" exception was created in the *criminal* context, see *Kania*, 650 F.2d at 265-269, and almost all the decisions applying the exception involve contracts made in that context, *e.g.*, *Sanders* v. *United States*, 252 F.3d 1329 (Fed. Cir. 2001); *Awad*, 61 Fed. Cl. 281; *Houston* v. *United States*, 60

to reject the lower courts' unwarranted, judge-made "sovereign capacity" exception and vindicate the Tucker Act's unambiguous grant of subject-matter jurisdiction.

II. The Decisions Below Conflict With Decisions Of The D.C. Circuit.

Just as the decisions below conflict with this Court's command to apply jurisdictional statutes according to their plain terms, they also conflict with recent decisions of the D.C. Circuit in similar breach-of-settlement cases. In two recent cases, the D.C. Circuit has held that claims by individuals against the United States Department of Agriculture ("USDA") for breach of litigation-related settlement agreements should have been brought in the Court of Federal Claims.

The plaintiff in the first case, *Shaffer* v. *Veneman*, 325 F.3d 370 (D.C. Cir. 2003), settled a race-discrimination claim with the USDA, agreeing to opt out of a pending class action against the agency in return for the agency's canceling his outstanding debt on USDA loans and other benefits. *Id.* at 371. When the USDA later denied a loan application submitted by the plaintiff, he filed a lawsuit in the United States District Court for the District of Columbia, alleging various breaches of the settlement agreement by the USDA. *Id.* at 371-372. The district court ruled that it lacked subject-matter jurisdiction because (1) the Tucker Act confers upon the Court of Federal Claims jurisdiction over claims for breach of contract against the United States and (2) the settlement agreement was a contract for purposes of the Tucker Act. *Id.* at 372. The D.C. Circuit affirmed, stating that "[t]here appears to be no doubt that the Court of Federal Claims could entertain this case under the Tucker Act, for the purpose of which a settlement agreement is considered a contract." *Id.* at 372, 374.

Fed. Cl. 507 (2004); *Bailey* v. *United States*, 54 Fed. Cl. 459 (2002); *Bloemker*, 229 Ct. Cl. 690.

Similarly, the plaintiff in *Brown* v. *United States*, 389 F.3d 1296 (D.C. Cir. 2004) (*per curiam*), entered into a settlement agreement with the USDA to resolve her Title VII claims against the agency. The plaintiff later brought suit for breach of that agreement. On appeal from the dismissal of the plaintiff's complaint, the D.C. Circuit explained that "[i]n order for Brown either to pursue remedies for breach of contract or to seek relief under Title VII, she must first prove the Department breached the settlement agreement. And because this contract question arises in a suit against the United States for more than $10,000 in damages, jurisdiction to decide whether the Department breached the settlement agreement lies *exclusively* in the Court of Federal Claims." *Id.* at 1297 (emphasis added).

Thus, the D.C. Circuit has squarely held that private plaintiffs' claims for breach of settlement agreements with federal agencies should have been brought in the Court of Federal Claims.[8] The D.C. Circuit did not apply the "sovereign capacity" exception that the Federal Circuit applied in this case. Instead, it simply applied the plain language of the Tucker Act and concluded that claims for breach of a settlement agreement are claims for breach of a contract and thus are covered by the Act. The Court should grant this petition to resolve the conflict between the decisions below and these decisions of the D.C. Circuit.

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[8] Following *Shaffer* and *Brown*, the United States District Court for the District of Columbia has dismissed breach-of-settlement claims against various federal agencies, concluding that jurisdiction was proper *only* in the Court of Federal Claims. See, *e.g.*, *Davis* v. *Veneman*, 2006 WL 2024981, at *3 (D.D.C. July 17, 2006) (USDA); *Pritchett* v. *Abraham*, 2006 WL 543994, at *1 n.3 (D.D.C. Mar. 6, 2006) (Department of Energy); *Ficken* v. *Rice*, 2006 WL 123931, at *7 (D.D.C. Jan. 17, 2006) (Department of State); *Greenhill* v. *Spellings*, 2005 WL 3508653, at *2-*3 (D.D.C. Dec. 22, 2005) (Department of Education).

III. The Decisions Below Involve An Important Federal Question That Should Be Decided By This Court.

This Court's review is all the more necessary because the decisions below will affect virtually *every* breach-of-contract claim asserted against the United States under the Tucker Act and its companion statute, the Little Tucker Act. As a result of such widespread application of the "sovereign capacity" exception, private parties will be forced to deal with the United States without knowing whether they have an avenue for redress in the event of a breach. And because the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims, the decision below represents the governing interpretation—or misinterpretation—of the Tucker Act and can only be corrected by this Court.

1. The analysis employed by the Court of Federal Claims and the Federal Circuit in this case applies to every Tucker Act case commenced in the Court of Federal Claims. In 2004-2005, 452 breach-of-contract complaints were filed in the Court of Federal Claims, accounting for more than 27 percent of that court's total filings. See Administrative Office of the U.S. Courts, *2005 Annual Report of the Director: Judicial Business of the United States Courts* 309 (Table G-2A) (2006). Indeed, contract disputes comprised the single largest portion of the Court of Federal Claims' docket that year (other than vaccine compensation cases). *Ibid.*

Under the decisions below, the court in each of these cases would have to determine whether the United States made the contract at issue in its sovereign or its proprietary capacity.[9] And because this doctrine purports to limit

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[9] Given the fact that the United States "performs no 'proprietary' functions" but acts in its sovereign capacity whenever it takes action within its constitutional authority, *Federal Land Bank of Wichita* v. *Board of County Comm'rs,* 368 U.S. 146, 150-

subject-matter jurisdiction—the court's "power to adjudicate the case"—the issue cannot be waived and must be decided *sua sponte* if neither party raises it. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); see *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453 (1900).

2. The decisions below will also affect cases arising under the Little Tucker Act, which uses the same phrase—"any express or implied contract"—at issue in this case. The Little Tucker Act gives federal district courts "original jurisdiction concurrent with the United States Court of Federal Claims" over claims "not exceeding $10,000 in amount, founded * * * upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). District courts considering such claims are bound by the decisions of the Federal Circuit. See *United States* v. *Hohri*, 482 U.S. 64, 68 (1987) (pursuant to 28 U.S.C. § 1295(a)(2), "the Federal Circuit has exclusive appellate jurisdiction of a case raising *only* a nontax claim under the Little Tucker Act"). And as they follow the Federal Circuit's lead in this area, district courts will at least consider the Court of Federal Claims' decisions interpreting identical statutory language in the Tucker Act. See, *e.g.*, *C.H.* v. *Sullivan*, 920 F.2d 483, 485 (8th Cir. 1990) (acknowledging *Kania* in dictum in a Little Tucker Act case); *United States* v. *Zajanckauskas*, 346 F. Supp. 2d 251, 254-259 (D. Mass. 2003) (holding that *Kania* did not apply to a Little Tucker Act claim arising from the breach of a non-criminal immunity agreement).[10]

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151 (1961), it is likely that the Court of Federal Claims would dismiss many of these breach-of-contract claims.

[10] The Court of Federal Claims in this case declined to follow *Zajanckauskas*, stating that "nothing in the *Kania* court's reasoning limited the sovereign capacity doctrine exclusively to so-called 'criminal' as opposed to 'civil' contracts." Pet. App. 13a-15a.

Because *Kania* purports to establish the scope of Congress' waiver of federal sovereign immunity with respect to breach-of-contract claims, its reasoning applies with equal force to claims under the Little Tucker Act. Indeed, one federal district court has applied *Kania*'s "sovereign capacity" exception to bar a claim under the Little Tucker Act. *Roudnahal* v. *Ridge*, 310 F. Supp. 2d 884, 894-895 (N.D. Ohio 2003) ("[u]nless a plaintiff can demonstrate that an agreement clearly subjects the government to monetary liability, a claim for breach by the government in its sovereign capacity is outside the waiver of sovereign immunity"). Thus, whether the claim seeks more or less than $10,000, *Kania* and the decisions below impose an additional, and unjustified, barrier to federal jurisdiction.

3. This additional layer of jurisdictional analysis only complicates an otherwise straightforward procedure for filing a claim against the United States. Any party that enters into an agreement with the United States—including a litigation-related agreement—does so with an expectation that the United States will honor its agreement. But any prudent contracting party must anticipate a breach, and the availability of a judicial remedy for breach informs that party's assessment of the proposed agreement. A private party might well forego dealing with the United States if it knows that there will be no opportunity for judicial review of the United States' performance under the contract.

In the Tucker Act, Congress provided an avenue for relief where the United States breaches its agreements—a suit for damages in the Court of Federal Claims. The decisions below, however, rewrite the statute in a manner that forecloses judicial review in many cases and leaves private parties uncertain whether they can enforce their agreements with the United States.

4. This Court's review is especially important given that the Federal Circuit's misinterpretation of the Tucker Act cannot be corrected in other cases brought in other circuits. That is because the Court of Federal Claims has

exclusive jurisdiction over breach-of-contract claims against the United States for more than $10,000, see *Clinton* v. *Goldsmith*, 526 U.S. 529, 539 n.13 (1999), and the Federal Circuit has *exclusive* jurisdiction over appeals from the Court of Federal Claims, see 28 U.S.C. § 1295(a)(3). Only this Court can resolve the jurisdictional problems created by the "sovereign capacity" exception, and it should exercise its supervisory authority to do so.

Such review would be in keeping with this Court's usual practice in cases arising from the Federal Circuit. Indeed, the Court has not hesitated to review decisions from the Federal Circuit—including Tucker Act decisions—where necessary to vindicate statutory requirements, even in the absence of a circuit conflict. *E.g.*, *eBay Inc.* v. *MercExchange LLC*, 126 S. Ct. 1837 (2006) (Patent Act); *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (Indian Tucker Act); *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (Indian Tucker Act); *Franconia Assocs.* v. *United States*, 536 U.S. 129 (2002) (Tucker Act); *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998) (Court of International Trade jurisdiction); *Hercules, Inc.*, 516 U.S. 417 (Tucker Act); *Keene Corp.*, 508 U.S. 200 (Tucker Act); *Mitchell*, 463 U.S. 206 (Tucker Act).

The Court should grant this petition to reaffirm the jurisdictional boundaries marked out by Congress in the Tucker Act and thus to ensure that private parties can deal with the United States against a backdrop of clear rules for dispute resolution. Just as the Court granted certiorari to decide whether the Court of Claims had jurisdiction to issue declaratory judgments, see *King*, 395 U.S. at 2, so the Court should grant this petition to decide whether the Court of Federal Claims can dismiss breach-of-contract claims against the United States under a judge-made "sovereign capacity" exception to the Tucker Act. This question, no less than the question presented in *King*, is "both substantial and important." *Ibid.*

* * * * *

This Court should grant the petition to reaffirm that the subject-matter jurisdiction of the Court of Federal Claims is defined by the plain terms of the Tucker Act, unlimited by a lower court's suppositions about congressional intent. Under the jurisdictional scheme that Congress enacted, and under the D.C. Circuit's approach to similar claims, petitioner is entitled to his day in the Court of Federal Claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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